

# Inclusion

## 1. Introduction

This briefing covers the right to education in a mainstream setting for children and young people with special educational needs (“**SEN**”) without Education, Health and Care Plans (“**EHC plans**”) and those with EHC plans.

**The fundamental principle** which underpins the law in this area is that where a parent (for a child with SEN) or a young person with SEN wants a place in a mainstream setting it must never be denied it on the basis that mainstream is unsuitable, or that their needs/disabilities are too great or complex.

## 2. Background

The United Kingdom is committed by international treaty<sup>1</sup> to increasing access by disabled children and young people to all mainstream education, including early years settings, schools and post-16 institutions and the activities within them.

Lord Nash, the minister speaking on behalf of the Department for Education during the passage of the Children and Families Act 2014 (“**C & F Act 2014**”), made clear that the Act is intended to implement the Government’s commitment to this policy and the right to mainstream remains as it was under the Education Act 1996 as amended in 2001.

Inclusive education is one of the principles stated to underpin the SEN and Disability Code of Practice 2015 (“**the Code**”)

However, recent studies have shown that the 30 year trend of increasing numbers in mainstream has reversed, and parents are increasingly met by mainstream schools suggesting that they are not suitable for a child with SEN or who is disabled.

## 3. Definition of Mainstream

In the law (C & F Act 2014 section 83), a mainstream school is a maintained school or an academy which is not a special school. Similarly, a mainstream post-16 institution (an FE college) is one that is not a special post-16 institution.

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<sup>1</sup> Articles 4 and 24 of the UN Convention of the Rights of Persons with Disabilities concern the right to inclusive education and the obligation accepted by the UK to take steps to bring that about.

Note that independent schools that are not special schools are not mainstream schools in the legal sense.

#### **4. Admission to Mainstream for Children and Young People without EHC plans**

##### ***The general rule and the exceptions***

Children and young people without plans must not be placed in special schools/institutions except in very limited circumstances. Those exceptions nearly all require (among other things) the prior consent of children's parents or of young people themselves when over the age of 16.

Section 34 of C & F Act 2014 says that, if they are to be educated in school or FE College, children and young people must be educated in mainstream settings.

The exceptions are:

- (a) if a parent or a young person pays for their own place in an independent or non-maintained special school/college;
- (b) a child or young person can be admitted to a special school or institution for an EHC needs assessment (i.e. for a plan), but this must be with the agreement of the parent/young person, the local authority (LA), the head teacher or principal of the special school or institution and anyone providing advice for the assessment; following assessment, if the LA decides not to issue a plan, the child/young person may only stay for a maximum of ten days following the decision, and if the LA decides to issue a plan, the child/young person may only stay until the plan is finalised<sup>2</sup>;
- (c) admission 'following a change in his or her circumstances' (not explained by the law or SEN Code, but may be when under threat of permanent exclusion, change in needs/diagnosis, etc.); this must be with the agreement of the parent/young person, the local authority, the head teacher or principal of the special school or institution, and the Code advises the LA to immediately start an EHC needs assessment;
- (d) admission to a special school in a hospital when the child/young person is admitted to hospital (does not require prior consent);
- (e) admission to a special academy (including a special free school) whose contract with the Department for Education allows it to admit children or young people with SEN who do not have an EHC plan.

##### ***Admission to special academies (including special free schools) for children/young people without EHC plans***

Although C & F Act 2014 does not require prior consent for this kind of admission, the Code says:

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<sup>2</sup> The Special Educational Needs and Disability Regulations 2014, Regulation 48.

*Those academies the Secretary of State authorises will make clear through their Funding Agreement that a child or young person with SEN but no EHC plan should be placed there only at the request of their parents or at their own request and with the support of professional advice such as a report from an educational psychologist. A special academy or special free school with these arrangements will be able to admit only those children who have a type of SEN for which they are designated. They will have adopted fair practices and arrangements that are in accordance with the Schools Admission Code for the admission of children without an EHC plan. (para. 1.30)*

Two points parents should be aware of on this:

- 1 If the child/young person has not had a formal statutory assessment or diagnoses, their needs and the provision to meet those needs may not have been properly identified, and therefore the suitability of the school may be questioned;
- 2 Pupils so admitted will be funded as though they were in a mainstream school, and in this position you will need to establish exactly what support would therefore be available.

### ***The Admissions Code (for children/young people without statements/plans)***

Whatever the law says, some parents meet mainstream schools that are unwelcoming and attempt to dissuade them from applying for admission. The Code says (paragraph 1.27):

*The School Admissions Code of Practice requires children and young people with SEN to be treated fairly. Admissions authorities:*

- ***must*** consider applications from parents of children who have SEN but do not have an EHC plan on the basis of the school's published admissions criteria as part of normal admissions procedures
- ***must not*** refuse to admit a child who has SEN but does not have an EHC plan because they do not feel able to cater for those needs
- ***must not*** refuse to admit a child on the grounds that they do not have an EHC plan

Your first step may be to remind the school of these requirements, but you may need to seek help from IPSEA and your local parent partnership adviser.

## **5. Admission to Mainstream for Children and Young People with EHC plans**

Children and young people with EHC plans must not be placed in special schools/institutions either against the wishes of parents and young people or when parents and young people have not asked for a special school/institution,

unless a mainstream placement would be incompatible with the efficient education of others (C & F ACT 2014 section 33). Note that the degree or complexity of needs/disabilities, and therefore suitability of mainstream, is not a reason in law for refusal of mainstream.

### **Reasonable steps**

Further, if the LA can show that a child or young person's presence would be incompatible with the efficient education of others (case law requires compelling evidence to back any such claim), then it must also be able to show that there are no 'reasonable steps' it can take to remove the incompatibility. The Code says that *'the term 'others' means the children or young people with whom the child or young person with an EHC plan would be likely to come into contact on a regular day-to-day basis'*.

The Code lists examples of reasonable steps at paragraphs 9.91 to 9.94.

The Code concludes this section by advising:

*A decision not to educate a child or young person in a mainstream setting against the wishes of the child's parent or the young person should not be taken lightly.*

If parents or young people are faced with such a decision, they need to make sure that the LA has

- identified with concrete facts what it is about the child/young person's presence that would prevent the efficient education of others;
- identified the 'others' whose education would be rendered inefficient;
- considered all possible reasonable steps which might remove the problem.

Any argument like 'the child's difficulties are too extreme for a mainstream school' will not succeed at the SEND Tribunal. The Code suggests that only extreme and/or persistent behavioural difficulties may produce an incompatibility that is not curable by reasonable steps: i.e., *'where the child or young person's behaviour systematically, persistently or significantly threatens the safety and/or impedes the learning of others'*.

## **6. Activities within the school**

Mainstream schools and maintained nursery schools (but not FE institutions) must ensure that children (but not young people) with SEN *'engage in the activities of the school together with children who do not have special educational needs'* provided that this is reasonably practicable, does not prevent them from receiving the support they need, and does not prevent the efficient education of the other children and the efficient use of resources (C & F ACT 2014, section 35). The reason for a child's exclusion from activities must therefore fall within these conditions. The Equality Act 2010 should also be

useful if a disabled child or young person is being excluded from activities (this Act covers young people too) and requires the school/institution to increase access, to anticipate and prevent problems and to use reasonable steps to include children and young people in activities. Remember also that inclusion is meant to be a fundamental principle underpinning the Code.